No. 18A-___

IN THE SUPREME COURT OF THE UNITED STATES

W. SCOTT HARKONEN, M.D.,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rule 13.5, W. Scott Harkonen requests a 32-day extension of time, to and including October 1, 2018, within which to file a petition for a writ of certiorari in this case. The United States Court of Appeals for the Ninth Circuit denied a petition for panel rehearing and rehearing en banc in this matter on June 1, 2018. App. B. Absent an extension of time, Dr. Harkonen's petition would be due on or before August 30, 2018. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

1. Dr. Harkonen was convicted of wire fraud in 2009 based on the issuance of a press release describing the results of a drug trial. *United States* v. *Harkonen*, 2015 WL 4999698, at *1 (N.D. Cal. 2015). The government's theory at trial was that Dr. Harkonen fraudulently opined in the press release—which was issued by the pharmaceutical company that Dr. Harkonen then headed—that a trial of the drug Actimmune demonstrated a mortality benefit. *Id.* The press release correctly reported

the trial data, but the government argued that the conclusions described in the headline and subheading of the press release were false because the study data did not reach a certain level of statistical significance, as measured by p-value.

Following Dr. Harkonen's conviction, the government's theory at trial was called into doubt. The American Statistical Association promulgated a statement of fundamental principles, which stated, among other things, that "[s]cientific conclusions and business or policy decisions should not be based only on whether a p-value passes a specific threshold."[1] This Court's decision in *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 40 (2011)—and in particular its statement that "[a] lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events"—also cast doubt on the government's reliance on p-values.

In 2014, Dr. Harkonen filed a petition for a writ of error coram nobis. The district court denied the petition, and the Ninth Circuit affirmed. App. A at 1-2. The court of appeals found Dr. Harkonen's "proffered evidence" of his innocence "compelling, especially in light of *Matrixx*," but nonetheless held that Dr. Harkonen had not demonstrated a right to relief because the new evidence did "not establish that his trial resulted in a manifest injustice." App. A at 2.

The Ninth Circuit's decision conflicts with the decisions of other circuits by holding that coram nobis relief is not available to a petitioner who has presented new evidence demonstrating his actual innocence. The Eighth Circuit, in contrast, has

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[1] Wasserstein & Lazar, "The ASA's Statement on *p*-Values: Context, Process, and Purpose," 70 The American Statistician 129 (2016).

recognized that coram nobis relief is available for compelling new evidence that undermines the factual basis for a conviction. *Kandiel* v. *United States*, 964 F.2d 794, 797 n.1 (8th Cir. 1992) (per curiam). The Ninth Circuit's heightened standard is particularly problematic in cases like this where the basis for the conviction is undermined by scientific developments because a defendant in such a case is left with no avenue for relief from his conviction. The Ninth Circuit's decision therefore creates a circuit split and presents an important issue for this Court's consideration.

2. Dr. Harkonen requests a 32-day extension of time in which to file a petition for a writ of certiorari. This extension is requested because undersigned counsel of record and the counsel assisting him have other pressing obligations in the coming weeks.

These include, among other things, multiple depositions in August in *Presnall* v. *Analogic Corp.*, No. 17 Civ. 830 (S.D.N.Y.) and *GolTV, Inc.* v. *Fox Sports Latin America Ltd.*, No. 16 Civ. 24421 (S.D. Fla.); argument in *Ostiguy* v. *Equifax Info Services, L.L.C.*, No. 17-50495 (5th Cir.) on September 7, 2018 and *Rodgers* v. *Christie*, No. 17 Civ. 5556 (D.N.J.) on September 12, 2018; and preparing others for argument in *Matter of Lacee L.*, No. 95 (N.Y. Court of Appeals) on September 5, 2018.

For the foregoing reasons, Dr. Harkonen respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 32 days, to and including October 1, 2018.

Respectfully submitted.

Alan E Schoenfeld /RMD

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. W. SCOTT HARKONEN, M.D., Defendant-Appellant.	No. 15-16844 D.C. No. 3:08-cr-00164-RS-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted May 15, 2017
San Francisco, California

Before: KLEINFELD and WARDLAW, Circuit Judges, and MORRIS,** District Judge.

Scott Harkonen appeals from the district court's order denying his petition for a writ of error coram nobis. A jury convicted him of wire fraud in violation of 18 U.S.C. § 1343. We affirmed his conviction on direct appeal. We have

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Brian M. Morris, United States District Judge for the District of Montana, sitting by designation.

jurisdiction under 28 U.S.C. § 1291, review the district court's denial of Harkonen's petition de novo, United States v. Riedl, 496 F.3d 1003, 1005 (9th Cir. 2007), and affirm.

1. Harkonen contends that the Supreme Court, in Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011), announced a new rule that requires vacating his conviction. Coram nobis is an extraordinary remedy, and a coram nobis petitioner may only relitigate the merits of an issue previously decided on direct appeal if he identifies a change in controlling law or makes a showing of "manifest injustice." Polizzi v. United States, 550 F.2d 1133, 1135–36 (9th Cir. 1976). We previously rejected the applicability of the Matrixx decision on direct appeal. United States v. Harkonen, 510 F. App'x 633, 638 (9th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013). Harkonen points to no change in controlling law. His proffered evidence—though compelling, especially in light of Matrixx—does not establish that his trial resulted in a manifest injustice warranting issuance of the writ.

2. Harkonen contends for the first time in his coram nobis petition that his trial counsel's performance was constitutionally deficient. His trial counsel, Harkonen says, should have called an expert witness in biostatistics or

pulmonology to challenge the government's contention that Harkonen misrepresented the results of a scientific study of the drug Actimmune. In preparation for trial, Harkonen's defense team consulted at great length with a number of highly qualified potential expert witnesses, including a biostatistician and a pulmonologist. But on the eve of the defense case in chief, trial counsel decided not to call these experts, even though they were prepared to testify. In his closing argument, Harkonen's trial counsel explained:

> [W]ay back at the beginning of the case, when we didn't really know what the evidence [was] in this case, how it was going to be, I told you that we were going to call experts in this case. It turned out that our experts came in the government's case: Dr. Crager, and by his absence, Dr. Pennington and Dr. Bradford, and certainly Dr. Porter.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" on Sixth Amendment grounds. Strickland v. Washington, 466 U.S. 668, 690 (1984). Later testimony of the biostatistician confirmed that Harkonen's trial counsel had expressed last minute concerns with the strength and focus of his planned testimony given the apparent success of trial counsel's cross examinations of the government's experts. Later testimony of the pulmonologist showed that at least some of his planned testimony could have detracted from Harkonen's case. And later testimony of

Harkonen's independent legal advisor revealed that "[a]t the time, Dr. Harkonen and I both agreed that if [trial counsel]'s assessment of [the] dangers of calling expert witnesses [were] accurate, his decision not to call them was correct." In these circumstances, trial counsel's informed decision not to call an expert was "a judgment call within the range of decisions falling within Strickland's standard of competent counsel," Jackson v. Calderon, 211 F.3d 1148, 1158 (9th Cir. 2000), not a fundamental error in the proceedings warranting the extraordinary remedy of coram nobis.

3. Given the availability of ample evidence from both sides concerning the decision not to present expert testimony—including sworn declarations from Harkonen's defense team, his independent legal advisor, and the expert witnesses the defense team chose not to call—the district court did not abuse its discretion in declining to hold an evidentiary hearing. Harkonen's contention that his trial counsel misjudged the need for expert testimony, even if proven, would not entitle him to relief in these circumstances.[1]

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[1] Because we hold that Harkonen failed to establish that his trial resulted in manifest injustice; failed to show his trial counsel's decision not to call an expert witness was not a judgment call by competent counsel; and failed to show the district court abused its discretion in declining to hold an evidentiary hearing, we need not reach whether his petition for coram nobis was timely.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. W. SCOTT HARKONEN, M.D., Defendant-Appellant.	No. 15-16844 D.C. No. 3:08-cr-00164-RS-1 Northern District of California, San Francisco ORDER

Before: KLEINFELD and WARDLAW, Circuit Judges, and MORRIS,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Wardlaw has voted to deny the petition for rehearing en banc, and Judges Kleinfeld and Morris have recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

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* The Honorable Brian M. Morris, United States District Judge for the District of Montana, sitting by designation.

CERTIFICATE OF SERVICE

On this 30th day of July, 2018, I caused all parties requiring service in this matter to be served with a copy of the foregoing by first class mail at the addresses below.

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